REG. v. KHOO GUAN TEIK

[A. Cr. J. (Rigby J.) March 8, 1957]

[Penang — Criminal Appeal No. 40 of 1956]

Rubber Supervision Enactment, 1937, ss. 11 & 21 — Licence holder charged with failure to keep books in prescribed form — Duty of prosecution — Chain of evidence.

Where a person is charged with a statutory offence which is imposed upon the holder of a licence, it is imperative for the prosecution to prove positively he was at the material time the holder of that licence.

It is of crucial importance that Police and Customs Officers investigating and/or prosecuting cases should appreciate the necessity of ensuring an unbroken chain of evidence as to the retention and custody of an exhibit from the moment it is first seized to the time it is produced in Court.

MAGISTRATE'S CRIMINAL APPEAL.

F. G. Cooke (Federal Counsel) for the appellant.

Lee Thean-Chu for the respondent.

Rigby J. : — This was an appeal by the Deputy Public Prosecutor from a decision of the learned Magistrate, sitting at Balik Pulau, Penang, acquitting and discharging the respondent on three charges preferred against him under the Federated Malay States Rubber Supervision Enactment (No. 10 of 1937) (extended to the Settlements by Legal Notification No. 296 of 1951).

I dismissed the appeal intimating that I would give my reasons in writing at a later stage. I now proceed to do so.

Under the 1st Charge the respondent was charged with that he, being a person licensed under section 11 of the Federated Malay States Rubber Supervision Enactment (extended to the Settlements), to purchase rubber at No. 3 Sungei Pinang Village, Balik Pulau, Penang, did fail to keep books of account in the prescribed form as required by section 21 of the same Enactment.

Under the 2nd and 3rd Charges he was similarly charged with that he, being a duly licensed purchaser, did, in the one charge, receive from a specified person 640 lbs. of sheet rubber without a written authority as required under the Enactment and, in the other charge, did fail to deliver a written memorandum, in the prescribed form, to the same person for the purchase of that rubber.

It is unnecessary to go in any detail into the facts of the case. The brief facts were that on the morning of the 12th August, 1956, a Police Constable saw a van standing in the street in Sungei Pinang Village. The van was half-loaded with rubber, some of which appeared to be wet and some dry. It was the wet rubber which formed the subject matter of the 2nd and 3rd Charges. Inquiries revealed that the rubber was in a van belonging to the respondent. Evidence given at the trial by two Malays called as prosecution witnesses was to the effect that the rubber had been seen by them to be floating in the river; that they had retrieved it; that they had taken it to the respondent to weigh and to sell to him; that the respondent told them that it was rotten; and that they finally left the rubber with him on the understanding that he should separate and smoke it and thereafter purchase it from them, if it was worth purchasing. No money was given to them and the rubber remained their property. Their story, improbable as it sounds on the face of it, may, or may not, have been true. The fact remains, however, that it formed an integral part of the case for the prosecution. The learned Deputy Public Prosecutor, before this Court, conceded that on that evidence there was insufficient evidence of a sale or purchase sufficient to support the 2nd and 3rd Charges. He contended, however, that there was sufficient evidence to support the 1st Charge.

The learned Magistrate acquitted the respondent on the ground that the prosecution had failed to prove that the respondent, as alleged in all three charges, was a person licensed under the provisions of the Enactment to purchase the rubber. No admissible evidence was given that he had any such licence.

In my view, the learned Magistrate was strictly correct in the view that he took. The gravamen of all these offences was that the respondent, being a duly licensed rubber purchaser, failed to comply with the statutory requirements imposed upon the holder of any such licence. It was, therefore, essential for the prosecution to prove that he was the holder of such a licence. The case is entirely different from that class of case where a person is charged with doing an act without being the holder of a valid licence empowering him to do that act, e.g., driving a motor car without a valid licence. In that class of case, since it is peculiarly within the knowledge of the person charged as to whether he has the requisite licence or authority empowering him to do the act that forms the subject matter of the charge, the law casts the burden of proving that fact — of producing that requisite licence or authority — upon him. Put in another way, where an offence consists in doing an act without lawful authority, it is not necessary for the prosecution to prove the negative averment of absence of authority; the onus is on the defence to prove that such authority existed. This is recognised by section 106 of the Evidence Ordinance. But this case is really the converse of that rule. There was no question here of proving a negative averment. The case for the prosecution was the positive averment that whilst he was the holder of a licence specifically issued to him, he did certain acts in breach

of that licence. It was clearly an essential preliminary part of the case for the prosecution to prove that he was, in fact, the holder of the said licence. This could, and should, have been done in one of two ways, either by production of the original licence, or by serving upon the responsent, in accordance with the provisions of section 66 of the Evidence Ordinance, a notice to produce the original document. If, and only if, the respondent had failed to comply with the notice to produce the original document, could secondary evidence as to the contents of that document become admissible. In the absence of the proper production of the licence or admissible secondary evidence as to its contents, there was, therefore, no evidence before the learned Magistrate that the respondent was a person licensed under the Enactment and the learned Magistrate, in my view, acted perfectly properly in dismissing the charges.

There is one further matter to which I would refer. The slipshod manner in which this case appears to have been investigated, and certainly the manner in which it was conducted and presented before the Court, left a great deal to be desired. The Government Chemist gave evidence that certain samples produced to him by a Revenue Officer — R.O. 589 — were rubber within the meaning of the Rubber Supervision Enactment. He returned these samples to another Revenue Officer — R.O. 822. Presumably, these samples purported to be samples of the rubber, found in the van, which formed the subject matter of the Charge. Presumably, it was on that assumption that they were put in as exhibits in the case. Yet neither the Revenue Officer who handed the rubber to the Chemist, nor the Revenue Officer who received it back from him, were called as witnesses. The failure to complete the chain of evidence as to the seizure, retention, identification and production of the rubber from the time it was first seized to the time it was produced in Court left it open to the grave criticism — as was quite properly made in this case during the trial — that there was no adequate or sufficient evidence that the rubber examined by the Chemist, or produced in Court, was, in fact, a specimen or part of the rubber originally seized.

It is of crucial importance that Police and Customs Officers investigating and/or prosecuting cases should appreciate the necessity of ensuring an unbroken chain of evidence as the retention and custody of an exhibit from the moment it is first seized to the time it is produced in Court.

It was for these reasons that I dismissed this appeal.

Appeal dismissed.

PUBLIC PROSECUTOR v. PATANI MOTORS CO. LTD.

[A. Cr. J. (Hill J.) March 9, 1957]

[Alor Star — Kedah Criminal Appeal No. 3 of 1957]

Dangerous Drugs Ordinance, 1952, s. 30(7) — Forfeiture of vehicle used in commission of offence — Vehicle not liable to forfeiture when used in breach of agreement.

A car used in the commission of an offence under the Dangerous Drugs Ordinance, 1952, will not be liable to forfeiture against the hirer when the agreement for the hire-purchase of the car contains a provision that the use of the car in contravention of the law by the hire-purchaser constitutes a breach of the agreement, and such use was without the knowledge or consent of the hirer.

Cases referred to:—

(1) *Loke Tham Chuan v. Public Prosecutor* (1955) M.L.J. 3.

(2) *Jelks v. Hayward* (1905) 2 K.B. 460.

MAGISTRATE'S CRIMINAL APPEAL.

B. Sheldon (Federal Counsel) for the appellant.

Ismail Khan for the respondents.

Hill J. : — On 24th November 1956 Wan Adam bin Haji Wan Jusoh was convicted in the Sessions Court, Alor Star, of an offence of being in possession of opium in motor car No. K. 5739. Wan Adam had purchased the car on a Hire Purchase agreement with Patani Motors and on the day of his conviction still owed a balance of $1,800.

When an application was made before the President on 11th December 1956 for the forfeiture of the car the application was dismissed as the learned President held that Patani Motors were the owners. Against this decision the Public Prosecutor has appealed.

I think it is advisable to set out in full the written judgment of the learned President. It was as follows :—

The application for forfeiture of Car K. 5739 arose out of Criminal Trial No. CSP. 5/56, in which the two accused were found by Revenue Officers in possession of opium concealed in the boot of the abovementioned car. The two accused were convicted and are now serving sentence in default of payment of the fine imposed.

It is not disputed by both Applicant and Respondent that the car was, at the time of the arrest of the two accused in the abovementioned case, in their custody by virtue of a hire purchase agreement between the male accused Wan Adam and the Respondent Company, Patani Motors Co., Ltd. Furthermore, the application revolves around the meaning of the word "owner" in section 30(7) of the Dangerous Drugs Ordinance and failure of the Respondent Company to establish its ownership within the meaning of section 30(7) would in itself be sufficient to lead to the forfeiture — since the "owner" would then be the accused, Wan Adam.

Buhagiar J. in Loke Tham Chuan v. Public Prosecutor[1] exhaustively discussed the meaning of "possession" and "ownership". I would quote that part of his judgment in which he dealt with Section 30(7) . . . . "the proper interpretation to be given to the words "is entitled to possession" is, in my opinion, "has the right